

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of the Application of)
)
SOUTHWESTERN PUBLIC SERVICE)
COMPANY) FCC File No. 749533
)
to Modify the License for Microwave Station)
KLD30)

ORDER

Adopted: June 19, 2000

Released: June 21, 2000

By the Chief, Public Safety and Private Wireless Division, Wireless Telecommunications Bureau:

1. *Introduction.* Southwestern Public Service Company (SWPSC) seeks to modify its license for Private Operational Fixed Point-to-Point Microwave Service Station KLD30 in Abernathy, Texas, to change the frequency in the 2 GHz band on which it operates.¹ In connection with this application, SWPSC seeks a temporary waiver² of Section 101.101 of the Commission's Rules, which limits the use of the frequencies on which SWPSC wishes to operate to common carriers.³ For the reasons set forth below, we deny the waiver request and dismiss this application.

2. *Background.* The Commission has reallocated portions of the 2 GHz band from fixed microwave service (FMS) to emerging technology (ET) services, including the personal communications services (PCS).⁴ To this end, the Commission has adopted certain transition rules.⁵ Rather than immediately clearing the 2 GHz band of the incumbent FMS users, the Commission permits the incumbents to continue to occupy the band on a co-primary basis with the ET licensees for a length of time, by the end of which the incumbents are to relocate to another portion of the spectrum.⁶ ET licensees have the option, however, of requiring the FMS incumbents to relocate sooner if they pay the additional costs caused by the earlier relocation.⁷

¹ Application for Authorization in the Microwave Services (FCC File No. 749533) (filed May 17, 1999).

² *Id.* at Exh. 1 (Waiver Request).

³ 47 C.F.R. § 101.101.

⁴ Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *First Report and Order and Third Notice of Proposed Rule Making*, ET Dkt. No. 92-9, 7 FCC Rcd 6886 (1992) (*ET First Report and Order*).

⁵ See 47 C.F.R. §§ 101.69-101.81. The rules are intended to reaccommodate the FMS licensees in a manner that would be most advantageous for the incumbent users, least disruptive to the public and most conducive to the introduction of new services. See *ET First Report and Order*, 7 FCC Rcd at 6886-87 ¶ 5.

⁶ 47 C.F.R. §§ 101.69(b), 101.79(a). See also *ET First Report and Order*, 7 FCC Rcd at 6886 ¶ 5.

⁷ See 47 C.F.R. §§ 101.69(a), 101.71-101.77.

3. SWPSC formerly operated Station KLD30 on frequencies in the 1900 MHz band. It states that it was required to relocate its 2 GHz FMS facilities in order to allow Sprint PCS, an ET licensee, to use those frequencies.⁸ SWPSC sought and received special temporary authority to operate the station on a frequency in the 2110-2130 MHz band.⁹ Section 101.101 of the Commission's Rules designates the 2110-2130 MHz band for use by common carriers, not for use by private radio licensees such as SWPSC.¹⁰ SWPSC states that by relocating to other 2 GHz frequencies, it was able to relocate its station immediately,¹¹ presumably because it was able to use its old equipment, and it now seeks a waiver of Section 101.101 to allow it to continue to operate on these frequencies for a period of two years in order to allow it time to purchase, license and install new equipment that will allow it to operate permanently on frequencies in a higher band.¹²

4. *Discussion.* We may grant a request for waiver when (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case and a grant of the requested waiver would be in the public interest, or (ii) in view of the unique or unusual circumstances of the case, application of the rule would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.¹³ SWPSC has not shown how it meets either of these standards with regard to Section 101.101 of the Rules. SWPSC states that it wishes to relocate to 2121.6 MHz only for a period of two years; that it needs the two years in order to allow it time to purchase, license and install new equipment; and that it will then permanently relocate to a higher frequency band.¹⁴ This argument, however, does not address the question (much less provide sufficient reason) why we should permit SWPSC to use, for private radio purposes, frequencies that have been allocated for common carrier use. SWPSC has provided no information on which we could conclude that the purpose of Section 101.101 or the public interest supports its proposal, or that its circumstances are unique or its alternatives limited. To give just one example, SWPSC has not explained why it cannot operate in that portion of the upper 2 GHz band allocated for private radio use (2130-2150 MHz and 2180-2200 MHz).¹⁵ We therefore deny SWPSC's request that we waive Section 101.101 of the Rules.¹⁶ Because denial of SWPSC's waiver request renders

⁸ Waiver Request at 1.

⁹ *Id.*

¹⁰ 47 C.F.R. § 101.101.

¹¹ Waiver Request at 1.

¹² *Id.*

¹³ 47 C.F.R. § 1.925(b)(3).

¹⁴ Waiver Request at 1.

¹⁵ *See* 47 C.F.R. § 101.101.

¹⁶ Moreover, in reallocating the 2 GHz band from FMS to ET services, the Commission permitted incumbent FMS licensees to relocate within the 2 GHz band only if all interested parties agree, including any ET licensee of the spectrum to which the incumbent FMS licensee wishes to move. Redevelopment of Spectrum to Encourage Innovation in the Use of New Telecommunications Technologies, *Memorandum Opinion and Order*, 9 FCC Rcd

its applications defective, we dismiss SWPSC's applications without prejudice.¹⁷

5. ACCORDINGLY, IT IS ORDERED that pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), and Section 1.925 of the Commission's Rules, 47 C.F.R. § 1.925, the Request for Temporary Waiver of Section 101.101 of the Commission's Rules of Southwestern Public Service Company, filed on May 17, 1999, IS DENIED.

6. IT IS FURTHER ORDERED that that pursuant to Sections 4(i) and 303 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 303, and Sections 1.925 and 1.934 of the Commission's Rules, 47 C.F.R. §§ 1.925, 1.934, the Application for Authorization in the Microwave Services to Modify the License for Station KLD30, Abernathy, Texas, FCC File Number 749533, of Southwestern Public Service Company, filed on May 17, 1999, IS DISMISSED WITHOUT PREJUDICE.

7. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
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1943, 1951 ¶ 56 (1994). The Commission also prohibited FMS licensees from relocating to any ET spectrum that is not yet allocated to a specific service, including the 2110-2130 MHz bands. *Id.* at 1951 ¶ 57. SWPSC therefore would need a waiver of this rule as well in order to be authorized to operate on the requested frequency.

¹⁷ See 47 C.F.R. § 1.925(c).